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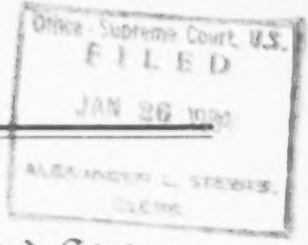

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PATRICK H. BERRY,
Plaintiff-Respondent,

VS.

AMERICAN COMMERCIAL BARGE LINES, a corporation, JEFF BOAT, INC. and LOUISIANA DOCK BOAT COMPANY, INC.
Defendants-Petitioners.

Petition For Writ Of Certiorari To The Appellate Court For The Fifth Judicial District of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The petitioner's argument that respondent is not a member of a crew of a vessel as a matter of law is based upon it's erroneous statement that plaintiff was a land-based worker whose work was confined to repairing vessels in drydock. This erroneous statement is refuted by the following language in the appellate court opinion: "Furthermore, the plaintiff did not do all of his work while in the drydock. He also repaired vessels afloat in the mississippi, and was thus 'exposed to the hazards of the sea' even if he was not when he was injured. A review of the facts in this case shows that plaintiff, contrary to many of the claimants in the decisions analyzed above, spent all of his time on board

vessels, as on the floating drydock and none of his time ashore." (*Berry* v. *American Commercial Barge*, 450 N.E.2d, page 9 & 10)

The record is replete with evidence that plaintiff's duties were not confined to working on the floating drydock.

The ACBL operated a fleet of vessels on the Mississippi River for commercial purposes. It also operated a marine facility which included a large floating drydock for the purpose of keeping its fleet of vessels in navigation up and down the river. When a ship would become damaged so that it had no power it would be towed into the marine facility to be repaired in the river. Those ships that were damaged below the water line were floated into the drydock for repairs. Those that were damaged above the water line were repaired while they were afloat in the river.

Plaintiff worked both on the drydock repairing boats and also did a great part of his work on those vessels that were damaged above the water line and could be repaired while they were afloat.

> Question: About how many times would you have worked on the water - - - I guess above water level repairs?
>
> Answer: Well it would be every day according to what I was working at and what I had to do on a barge. I'd stay on a barge until it was done and they didn't need a fitter no more. (C121)
>
> Question: You would actually work on barges that were going back out on the water?
>
> Answer: They were already in the water. The only ones that wouldn't be in the water would be in the drydock. The rest would be tied off or have damage and would be above the water line and we'd repair it there. They wouldn't have to put it in the drydock. (C118-119)

Plaintiff used lines and wires on vessels everyday. This was true whether he was working on dock vessels or other vessels (R 334-335). When he got to work he was on vessels all of the time (R. 338). All employees on the drydock would use lines everyday (R.38-41).

The safety rules (Plaintiff's Exhibit 43) Promulgated by the petitioner, in pertinent part, provided:

10. *ALL* DECK *OPENINGS SHALL BE GUARDED.*

11. *A PORTABLE LIFE RING MUST* BE TAKEN TO WORK AREAS WHEN EMPLOYEES WILL BE WORKING ABOARD ANY *VESSEL AFLOAT — EXCEPT* WHEN A LIFE RING IS EASILY *VISIBLE AND READILY* ACCESSIBLE.

12. *LIFE JACKETS MUST* BE WORN ON ALL WORK FLATS, HARBOR BOATS, BARGES AFLOAT, AND ALL OTHER AREAS *NOT PROTECTED BY GUARD RAILS.* (Plaintiff's Exhibit 43)

REASONS FOR DENYING THE WRIT

I.

The Appellate Court for the Fifth Judicial District of Illinois decided this case in accordance with the decisions of this court and of the Federal Appellate Courts which have considered the question presented by this appeal. The Appellate Court held and petitioners agree that for Jones Act purposes one can be a member of a crew of a vessel if he has a more or less permanent connection with a vessel or a specific group of vessels or performs a substantial part of his work aboard a vessel or a group of vessels.

The Jones Act (46 USC §688) provides that "any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action, all statutes of the United States modifying or extending the common law right on remedy in cases of personal injury to railway employees shall apply."

In *South Chicago Coal & Dock Co.* v. *Bassett,* 1940, 309 US 251, 60 S Ct 544, 84 L ed 732, the United States Supreme Court held that there was sufficient evidence to support a finding of the commissioners that the petitioner was under the coverage of the Longshoremen's Act.

In *Senko* v. *Lacrosse Dredging Corp.,* 352 U.S. 370, 1 L ed 2d 404, 77 S Ct 415, the U.S. Supreme Court reversed an Illinois Appellate Court decision (66 Ill.App. 2d 307, 129 N.E.2d 454) which held that there was insufficient evidence to support the jury's findings that Senko was a crew member. The U.S. Supreme Court stated: "As we have said before, this Court does not normally sit to re-examine a finding of the type that was made below. We believe, however, that our decision in *Chicago Co.* v. *Bassett* (US) *supra,* has not been fully understood. Our holding there that the determination of whether an injured per-

son was a 'member of a crew' is to be left to the finder of fact meant that juries have the same discretion they have in finding negligence or any other fact. The essence of this discretion is that a jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate." (1 L ed 2d 404, 408)

Since the "Senko" holding, both the federal and state courts have held that almost all disputed questions concerning the status of injured persons claiming under the Jones Act were questions of fact for the jury. The landmark decision on the relationship between the trier of fact on the issue of the status within the meaning of the Jones Act is *Offshore Company* v. *Robinson,* 266 F 2d, 769, 75 ALR 2d 1296. This case was decided by the United States Court of Appeals for the Fifth District and has effectively implemented the "Senko" case. Concerning the relationship between the Longshoremen's Act and the Jones Act, the court stated:

> "The process of liberal construction of the Jones Act cannot now be ignored because Congress has seen fit to pass the Longshoremen's Act. As a result of the cases, we feel constrained to hold that one who does any sort of work aboard a ship in navigation is a 'seaman' within the meaning of the Jones Act.' *Carumbo* v. *Cape Cod S.S. Co.,* 1 Cirl, 1941, 123 F2d 991, 995. In that case the court pointed out that even a cook or an engineer is aiding in navigation." Whatever may have been the original intention of Congress, courts have given an extremely liberal interpretation to the terms 'seaman' and 'member of a crew of any vessel' without provoking any congressional amendments restricting the coverage of the act." 266 F2d 769, ALR2d 1296 at page 1304.' "

The facts in *Braniff* v. *Jackson Ave. - Gretna Ferry, Inc.,* 280 F2d 523, are very close to the facts in this case. In *Braniff* a superintendent in charge of maintenance of ferries, Braniff, and

his shore gang employee, Brown, were killed when the work boat in which they were engaged in making repairs on machinery on the ferry overturned. The district court entered a summary judgment in favor of defendants. In reversing the district court, the Court of Appeals held that the issue of whether the decedents were seamen within the meaning of the Jones Act was an issue for the trier of fact. Braniff was in charge of a six man "shore gang". The shore gang took orders from Braniff. It was the general practice of Braniff and the "shore gang" to report to the waterfront each morning. Braniff would then board each of the ferries to ascertain what repairs were necessary. Braniff was not assigned to nor did he stand watch aboard any of the ferries. He as well as the decedent, Brown, and other members of the shore gang, lived ashore and worked ordinary working hours.

The court said:

> "A company pilot in the regular employ of a concern operating an identifiable fleet of vessels who customarily and regularly boards every one of several specified vessels to dock and undock them would certainly satisfy the requirement that his duties contribute to the functioning of the vessel and to the accomplishment of its mission. If working regularly on all of them performing a substantial part of his work on each, the other element would likewise be satisfied. A declaration that such a person was a seaman with respect to injuries received on any one of them would afford "no reason for lamentations." 266 F 2d 769, 780. No more so should there be for an engineer performing like regular services of immediate, direct, critical importance to the operation of the ferries as ferries." *Braniff* v. *Jackson Ave. - Gretna Ferry, Inc.*, 280 F 2d 523 at page 529. (Page 6-9 of Answer to Petition for Leave to Appeal).

In *Bertrand* v. *International Mooring and Marine Co., Inc., et al* 700 F 2d 240, the trial court granted summary judgment in

favor of the defendant on the grounds that plaintiffs were not, as a matter of law, members of the crew of a fleet of vessels. The Appellate Court held that although the facts were undisputed, conflicting inferences could be drawn from them and that, therefore, it was error for the trial court to grant summary judgment in favor of the defendant.

The court also held that the fact that claimants work placed him on several different vessels did not preclude seaman status for Jones Act purposes even though his employer did not own or control several vessels upon which the plaintiff worked.

Finally, the court held that there was an evidentiary basis for the plaintiff to establish that he was a member of a crew of a vessel or group of vessels if he performed a substantial part of his work aboard the vessel or vessels or by proving that he was permanently assigned to the vessel or vessels. The record reflects that the plaintiff was permanently assigned to the fleet of vessels operated by petitioner and also performed a substantial part of his work on them so he satisfies either test.

Petitioners contend that plaintiff could not be covered under the Jones Act (46 USC 688) since he was covered under the Longshoremen's and Harbor Worker's Act (33 USC 903) and that the Longshoremen's Act was his exclusive remedy. This argument leaves no place for a fact finder to find facts or to draw inferences as to those covered under either of the foregoing acts and is in direct conflict with the decisions of this court and other federal courts. The best illustration of the fallacious argument of petitioner is illustrated by the following language from the recent case of *McDermott, Inc.* v. *Boudreaux,* 679 F.2d 452 (1982):

> "In excluding Boudreaux from coverage, we wish to emphasize our recognition that the Longshoremen's Act, like the Jones Act, requires a liberal interpretation in favor of claimants to effect its purposes. See, e.g., *Voris* v. *Eikel,* 346 U.S. 328, 333, 74 S.Ct. 88, 91, 98 L.Ed. 5 (1953). We

do not lightly exclude workers from coverage as a matter of law under either statute. Thus, despite our contined insistence that a Jones Act "seaman" and a "crew member" excluded from the Longshoremen's Act are one and the same (in other words, that the statutes are mutually exclusive) we realize that, in a practical sense, a "zone of uncertainty" inevitably connects the two Acts. Confronted by conflicting evidence concerning a worker's duties or undisputed evidence concerning an occupation that exhibits the characteristics of both traditional land and sea duties, a factfinder might be able to draw reasonable inferences to justify coverage under either statute."

II

With reference to petitioners argument that the trial court erred in giving plaintiff instruction no. 21, this contention was not presented to the Supreme Court of Illinois in petitioner's Petition for Leave to Appeal to that court. The contention was made in the Appellate Court and adequately answered in the Appellate Court opinion. Furthermore, the same type of instruction was approved in Marine Drilling Company v. Autin, 369 F 2d 579.

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be denied.

Respectfully submitted,

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